SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 784

THE BOARD OF PUBLIC INSTRUCTION OF BAY COUNTY, FLORIDA, ET AL., *Petitioners,*

v.

JEAN CAROLYN YOUNGBLOOD, ET AL., and UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY MEMORANDUM

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Within the limitations imposed by Rule 24(4), the petitioner Board submits three points in reply to the Government's Brief in Opposition; two are substantive, while the third raises a serious procedural issue that is common to virtually every school desegregation case.

1. The Constitution Bars Classification Based on Race.

We disagree emphatically with the position of the court below (Pet. App. A10, quoted at Br. Op. 7) that "true nondiscrimination may be attained, paradoxically, only by taking color into consideration." This is the same odious fallacy that the court below has espoused ever since its ill-starred decision in *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 380 F.2d 385, certiorari denied *sub nom. Caddo Parish School Board* v. *United States,* 389 U.S. 840, and to which it has tenaciously adhered ever since.

We similarly disagree with the Government's position, expressed orally by the Solicitor General during the argument of the six school cases on October 12-14, that racial classification is justified in order to correct past discrimination.

Our starting point, although obviously it cannot be fully developed at this juncture, is that every form of racial classification is unconstitutional. Apart from that, we submit that the foregoing formulations on the part of the United States really beg the question, inasmuch as dual school systems for many years, indeed as late as *Gong Lum* v. *Mississippi,* 275 U.S. 78 (1927), were held *not* to involve either discrimination or unconstitutional State action.

Consequently to argue, as did all the respondents below, and as the Solicitor General contended orally here in October, that present racial discrimination is justified by the prior fact of dual school systems, is to say as a realistic matter that it is proper to exclude children of both races from the schools nearest their homes because of their color and only because of their color, directly contrary to the ruling in *Alexander* v. *Board of Education,* 396 U.S. 19, 20, simply because this Court some 45 years ago held views differing from those that prevail today.

It is proper also to note that the dichotomy suggested by the Government (Br. Op. 7) between "racial balance," of

which we complain, and "feasible means to desegregate," which the Government supports as well settled, involves—depending on the point of view—either semantics or else a sorry quibble. The court below has long insisted that desegregation involves racial balancing; the Congress, undertaking to enforce the Fourteenth Amendment, has clearly indicated the contrary—our next point.

2. The Civil Rights Act Provisos Are Highly Relevant.

President Kennedy called on the Congress to exercise its power under Section 5 of the Fourteenth Amendment to implement that Amendment, and Congress did so, indicating in §§ 401(b) and 407(a) of the Civil Rights Act of 1964 in clear and unmistakable language its view that desegregation did not include, and should not include, racial balancing. We set forth the text of those provisos at Pet. 3-4, summarized their legislative history at Pet. 10-11, and then expanded our summary to include every significant feature of this history at Pet. App. A21-A27.

No objective or dispassionate person examining the actual legislative history of those provisos can, we submit, fairly arrive at the conclusion set forth in the Memorandum for the United States in *McDaniel* v. *Barresi*, No. 420, this Term, that we quoted at Pet. 11-12 and that the Government now reaffirms in a footnote (Br. Op. 7, note 6). That is because the Government's conclusion rests on a very few citations to fragmentary, inadequate, and hence thoroughly misleading excerpts from that legislative history—which it resolutely refuses to examine in its entirety.

In the arguments before this Court last month, the Civil Rights Act provisos received only glancing mention. We submit that it would be eminently appropriate for those provisos to be explored in depth, on plenary hearing and on the basis of the complete legislative history, rather than on the unrepresentative fragments twice served up to this Court by way of trivializing a solemn determination made by the Congress.

3. The Government's Suggestion That Petitioner Is in the Wrong Court Effectively Deprives All School Boards of Review By This Court.

The Government says (Br. Op. 5, note 5) that "Insofar as petitioners are complaining of orders of the district court rendered subsequent to the decision of the court of appeals (see Pet. 2, 9-10), they are, of course, before the wrong court. 28 U.S.C. 1291."

That facile, footnoted, and wholly fallacious "of course" conceals the fact that the quoted comment in reality suggests depriving school board defendants of review by this Court—because of the course of action consistently followed by the court below.

1. It is now settled that in school cases in the Fifth Circuit "No stay will be granted pending petition for rehearing or application for certiorari." *Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F.2d 1211, 1222.

2. In the opinion sought to be reviewed, which was handed down on July 24, 1970 (Pet. App. A1), the district court was directed to "hold a prompt hearing and shall approve a more effective segregation plan to be put into effect in September 1970" (Pet. App. A11). The district court order of August 14 (Pet. App. A13-A20) was entered pursuant to that mandate.

3. A petition for rehearing seeking clarification of the Fifth Circuit's opinion in this case was served and filed on August 5, before the district court acted—but that petition was held and not denied by the court below until September 11, more than a month later (Pet. App. A12).

4. What the district court ordered, in the absence of further clarification from above, complied in every respect with the directions of the court below (Pet. App. A10-A11). True, those directions were not explicit, but they clearly justified, indeed they required, what the district court then ordered (Pet. App. A13-A20).

The transcript of the August 14 hearing at which the district court adopted the plan now in effect shows that, far from there being any objection that such plan was not in accordance with the direction of the court below, the plan was agreed to by counsel for both sets of respondents, subject to later reports regarding its operation and effect.*

5. It follows that the present petition seeking a writ directed to the court of appeals necessarily involves review of what the district court did in conformity to, and under the compulsion of, the court of appeals' decision. (In this connection it is to be noted that the court below now enters

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* See transcript of district court hearing, Aug. 14, 1970, pp. 11-12:

"MR. BOWERS [Counsel for respondents Youngblood *et al.*]:

"May it please, the Court, we have agreed to this plan as a compromise. We will have to delay a decision on whether it establishes a unitary system until after the School Board files its reports and see who actually is in the school and etcetera, but we think it is a good—

"THE COURT:

"Do you feel as the plan exists as presented absent some unusual turn over or some change in the number of students attending the various schools, that this plan would accomplish a unitary system?

"MR. BOWERS:

"Yes, sir.

"THE COURT:

"Thank you, sir. Mr. Buckley?

"MR. BUCKLEY [Of the Civil Rights Division, Dep't of Justice]:

"That is the Government's position also, Your Honor. We would like to see it in operation. This is a plan that has been talked about in prior proceedings in this case, and we feel it will [result] in a unitary system, but again we would like to review the reports when it has been implemented for a period of time."

no formal judgments as mandates in school board cases, and that the opinion is issued as and for the mandate in all such cases.)

The conclusion advanced by the Government, that petitioner is seeking relief in the wrong forum, would involve a whipsawing of school boards in cases such as this one, since it would require them to take two appeals before the cause is ripe for certiorari, and, it may be, even more. That conclusion consequently involves the unacceptable, and, we submit, inadmissible result that the Fifth Circuit's present rush-rush-rush practice in school cases effectively insulates its rulings from this Court's prompt corrective scrutiny.

CONCLUSION

For the foregoing additional reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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